

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CARMEN FERNANDEZ</b>	)	
Claimant	)	
VS.	)	
	)	
<b>SAFELITE AUTO GLASS</b>	)	
Respondent	)	Docket No. 244,854
	)	
AND	)	
	)	
<b>WAUSAU UNDERWRITERS INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier appeal from a preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on August 1, 2002.

**ISSUES**

The Administrative Law Judge (ALJ) granted claimant's request for a hot tub which had been prescribed by the authorized treating physician. Respondent and its insurance carrier (respondent) state the issues as:

- (1) Whether the Board has jurisdiction to hear this current appeal and
- (2) Whether the purchase of a hot tub is medical treatment as defined by the Kansas Workers Compensation Act.<sup>1</sup>

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<sup>1</sup> Respondent's Brief at 1 (filed Sept. 4, 2002).

Claimant contends that: "While this Board may not have arrived at the same conclusion, it is certainly within the Administrative Law Judge's discretion to issue such orders. While this matter may certainly be reviewable at [the] time of [the] final award, it is submitted that such a review at this juncture would be inappropriate." <sup>2</sup>

There is no issue concerning the compensability of the claim.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board (Board) concludes it does not have jurisdiction at this point in the proceedings to determine the issues raised, and the appeal should be dismissed.

Medical compensation is governed by K.S.A. 44-510h. That statute states, in pertinent part:

It shall be the duty of the employer to provide the services of a health-care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 44-510h, as noted above, requires that employers provide such medical treatment as is "reasonably necessary to cure and relieve the employee from the effects of the injury." The caselaw interpreting this language has consistently found that the statute contemplates the employer being responsible for all treatment which relieves the employee's symptoms, arising from the injury.<sup>3</sup>

There is no question but that claimant suffered compensable injuries, in connection with this claim. The statute requires that he be provided such medical treatment as is "reasonably necessary" to treat and relieve the effects of those injuries. Where the respondent refuses to voluntarily provide a medical treatment expense, the claimant may seek an order from the ALJ authorizing the treatment and have the expense associated with that treatment paid by the respondent. But respondent contends a hot tub is neither

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<sup>2</sup> Claimant's Brief at 1 (filed August 21, 2002).

<sup>3</sup> See *Carr v. Unit No. 8169/Midwestern Distribution*, 237 Kan. 660, 703 P.2d 751 (1985); *Harris v. Bechtel-Dempsey-Price*, 160 Kan. 560, 164 P.2d 89 (1945).

medical treatment nor reasonably necessary to cure and relieve the effects of claimant's injury.

The Kansas Court of Appeals has held that a personal motor vehicle is not medical treatment under K.S.A. 44-510(a), the predecessor to K.S.A. 44-510h. In *Hedrick v. U.S.D. No. 259*, the Court of Appeals accepted an appeal from a preliminary hearing order in which the ALJ awarded claimant reimbursement for a portion of the cost of a vehicle. In that case, Ms. Hedrick had suffered a hip injury and the authorized treating physician recommended she obtain a larger vehicle, which would allow her easier access. Ms. Hedrick testified that, as a result of her injury, she was unable to get in and out of her present vehicle. The Board refused to review that preliminary order on an appeal from a preliminary hearing because it was not a final order and it did not raise one of the jurisdictional issues listed in K.S.A. 44-534a. In so finding, the Board determined that the order for the vehicle fell within the jurisdiction given the ALJ to make orders concerning medical care at a preliminary hearing. The Court of Appeals disagreed and found the ALJ had exceeded his jurisdiction in making the order because the motor vehicle did not constitute medical treatment or a medical apparatus under K.S.A. 44-510(a). In dicta, however, the court added a proviso to the effect that its holding might be different had claimant's injury resulted in paraplegia. The court did not explain this distinction.<sup>4</sup>

Since the injury claimant's back has never been symptom free. There is evidence that claimant's chronic back pain would be relieved or reduced by the use of a therapeutic hot tub. Dr. Pedro Murati prescribed the hot tub and reasoned that such was reasonable and necessary medical treatment. Although respondent's medical expert, Dr. Chris Fevurly disagreed, the ALJ agreed with Dr. Murati and awarded the hot tub ". . . to fulfill the therapeutic needs of the claimant."

There is no question that the evidence supports the conclusion that claimant, as a result of his injuries, suffers chronic pain and that he obtains some relief from that pain with a hot tub. The question of whether the employer must provide a hot tub, and also the question of whether the Board has jurisdiction to review the ALJ's order, turns on whether the use of a hot tub constitutes medical treatment. Under the statute, medical treatment includes "nursing, medicines, medical, and surgical supplies, ambulance, crutches, apparatus. . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury."<sup>5</sup> In *Hedrick* the court said that treatment was "[a] broad term covering all the steps taken to effect a cure of an injury or disease; including examination

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<sup>4</sup> See *Bhattarai v. Taco Bell*, No. 261,986, 2002 WL 1838755 (Kan. WCAB Jul. 26, 2002); *Butler v. Jet T.V.*, No. 106,194, 1998 WL 229860 (Kan. WCAB Apr. 14, 1998).

<sup>5</sup> K.S.A. 44-510h.

and diagnosis as well as application of remedies.”<sup>6</sup> The Board finds the prescribed hot tub constitutes medical treatment in this case.<sup>7</sup>

Accordingly, the Board concludes that this appeal does not raise a jurisdictional issue.<sup>8</sup> K.S.A. 44-534a lists jurisdictional issues. Whether or not certain medical treatment is reasonably necessary and should be authorized is not among the issues listed. Where other jurisdictional prerequisites are met, including notice, timely written claim, and accident arising out of and in the course of employment, the ALJ has jurisdiction to determine whether certain recommended medical treatment is reasonable and necessary. The ALJ's decision on this question is not subject to review at this stage of the proceeding.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the appeal of the Order entered by Administrative Law Judge Jon L. Frobish on August 1, 2002, should be, and the same is hereby, dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2002.

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BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant  
Richard J. Liby, Attorney for Respondent and Insurance Carrier  
Jon L. Frobish, Administrative Law Judge  
Director, Division of Workers Compensation

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<sup>6</sup> 23 Kan. App. 2d at 785.

<sup>7</sup> See *Christy v. U.S.D.* 365, No. 168,575, 1995 WL 712384 (Kan. WCAB Oct. 20, 1995).

<sup>8</sup> K.S.A. 44-551(b)(2)(A).